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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35517

CF INDUSTRIES, INC. v. INDIANA & OHIO RAILWAY, POINT COMFORT AND NORTHERN RAILWAY, AND THE MICHIGAN SHORE RAILROAD—PETITION FOR DECLARATORY ORDER

Docket No. NOR 42129[1]

AMERICAN CHEMISTRY COUNCIL, THE CHLORINE INSTITUTE, INC., THE FERTILIZER INSTITUTE, AND PPG INDUSTRIES, INC. v. ALABAMA GULF COAST RAILWAY AND RAILAMERICA, INC.

Digest:[2] In this decision, the Board dismisses as moot and without prejudice a petition for declaratory order and a complaint addressing certain railroad practices related to transportation of Toxic-by-Inhalation Hazardous materials and Poison-by-Inhalation Hazardous materials.

Decided: June 19, 2013

In these proceedings, several chemical shippers and trade associations requested that the Board declare invalid and unenforceable certain requirements issued by RailAmerica, Inc., and several of its railroad subsidiaries[3] regarding rail transportation of Toxic-by-Inhalation Hazardous materials and Poison-by-Inhalation Hazardous materials (TIH/PIH). The shippers

[1] These proceedings are not consolidated. A single decision is being issued for administrative convenience.

[2] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[3] For convenience, we will refer to RailAmerica, Inc., and its subsidiary railroads together as RailAmerica or respondents. The railroads named as respondents in Docket No. FD 35517 are Indiana & Ohio Railway Company (IORY), Point Comfort and Northern Railway Company (PCN), and Michigan Shore Railroad (MSR); the railroad named as respondent in Docket No. NOR 42129 is Alabama & Gulf Coast Railway LLC. RailAmerica states that MSR is an unincorporated division of Mid-Michigan Railroad, Inc. RailAmerica Apr. 16, 2012 Reply 3 n.1.

alleged unreasonable practices in (1) tariffs issued by individual railroad subsidiaries of RailAmerica, Inc.; and (2) a document described as a "standard operating procedure" (SOP) created by RailAmerica, Inc.

This decision dismisses as moot and without prejudice a petition for declaratory order and a complaint challenging these practices, because the Board addressed some of the challenged practices in a prior decision[4] and respondents have now withdrawn the remaining practices at issue.

BACKGROUND

On April 15, 2011, American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. (PPG) (collectively, complainants), filed a complaint in Docket No. NOR 42129 against Alabama & Gulf Coast Railway LLC (AGR) and RailAmerica, Inc. Complainants requested a determination by the Board that implementation of the SOP, including the "special train service" allegedly required by AGR, is an unreasonable practice under 49 U.S.C. § 10702 and a violation of the common carrier obligation under 49 U.S.C. § 11101. In particular, the complaint challenged AGR's implementation of certain practices through its tariff, as discussed below. See Compl. ¶¶ 7-9. Complainants asked that the Board order respondents permanently to cease carrying out the challenged practices, and complainants also filed a motion pursuant to 49 U.S.C. § 721(b)(4), asking that the Board enjoin the challenged practices while the proceeding is pending.

On May 17, 2011, CF Industries, Inc. (CF) filed a petition for declaratory order in Docket No. FD 35517, requesting that the Board declare invalid and unenforceable certain tariffs addressing the movement of TIH/PIH materials issued by IORY, PCN, and MSR, as well as any associated implementation procedures under the SOP. These tariffs are identical to the tariff at issue in Docket No. NOR 42129, other than the actual rates charged.

In a decision served on September 30, 2011, in both dockets, the Board instituted a declaratory order proceeding in Docket No. FD 35517 to develop a single record on all the substantive issues presented in these cases other than complainants' injunction request. By decision served on May 4, 2012, in Docket No. NOR 42129, the Board denied complainants' request for preliminary injunctive relief and held that docket in abeyance pending issuance of a final decision in Docket No. FD 35517.

In Docket No. FD 35517, the parties filed opening evidence and argument on January 13, 2012, replies on February 27, 2012, and rebuttal on March 13, 2012.

[4] See CF Indus., Inc. v. Ind. & Ohio Ry.—Pet. for Declaratory Order, FD 35517 et al. (STB served Nov. 28, 2012).

By decision served on November 28, 2012, the Board found reasonable respondents' practice of operating trains at an appropriate speed for safe operations based on current conditions. However, the Board also directed respondents not to enforce a blanket lower speed limit, specific to TIH/PIH, that applies at all times and in all locations, as respondents had eliminated such speed limits from their tariffs and represented that they were no longer enforcing such a restriction, but the record suggested that respondents may have been doing so nonetheless. With respect to respondents' priority train service[5] and their limitation of three TIH/PIH cars per train, the Board requested comments from the Federal Railroad Administration, the Pipeline and Hazardous Materials Safety Administration, and the Transportation Security Administration regarding the effects on safety and security of these practices.

On January 18, 2013, following the acquisition of control of RailAmerica by Genesee & Wyoming Inc. (GWI),[6] respondents filed a motion to dismiss these proceedings as moot. Respondents stated that they and several of their affiliates have amended their tariffs to eliminate priority train service and the limitation of three TIH/PIH cars per train, which are the only two practices still at issue in these proceedings. According to respondents, GWI directed them to take this action to standardize their practices with the practices of other GWI railroad subsidiaries, which do not impose these requirements.[7]

In a decision served on January 24, 2013, the Board held that, except for replies to the motion to dismiss, Docket No. FD 35517 would be held in abeyance, and Docket No. NOR 42129 would remain in abeyance, until further order of the Board. The shipper parties filed replies to the motion to dismiss on February 7, 2013.

DISCUSSION AND CONCLUSIONS

In Docket No. FD 35517, CF seeks a declaratory order regarding the reasonableness of respondents' tariff provisions. The Board has broad discretion to determine whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Here, the challenged tariff provisions have been withdrawn, and, as a result, CF's request that the Board determine whether these tariff provisions are invalid and unenforceable[8] no longer presents an

[5] Respondents' tariffs state that a priority train immediately delivers the car or cars to the receiver, without starting and stopping at different shipper locations along the route to the receiver.

[6] See Genesee & Wyoming Inc.—Control—RailAmerica, Inc., FD 35654 (STB served Dec. 20, 2012).

[7] See Respondents Jan. 18, 2013 Mot. to Dismiss 5.

[8] As noted above, CF and the shipper parties in Docket No. NOR 42129 also refer to practices described in RailAmerica's SOP. However, aside from the speed limits addressed in

(continued . . .)

active case or controversy for the Board to resolve. Therefore, CF's petition for a declaratory order will be denied as moot. See, e.g., Nat'l Solid Wastes Mgmt. Ass'n—Pet. for Declaratory Order, FD 34776, slip op. at 4 (STB served Mar. 10, 2006).

CF opposes the motion to dismiss, arguing that the parties and the Board have expended considerable resources in developing the record in this proceeding and that these efforts would be wasted if respondents decide to adopt the same or similar provisions again.[9] The Board shares this concern, and accordingly, our dismissal of this proceeding will be without prejudice. Moreover, should respondents adopt the same or similar provisions again, parties may petition to reopen this proceeding based on such substantially changed circumstances (see 49 C.F.R. § 1115.4), and the record already developed in these proceedings may be incorporated to the degree relevant.

Similarly, in Docket No. NOR 42129, respondents' withdrawal of the challenged tariff provisions leaves no active case or controversy over the reasonableness of these provisions. Complainants argue that a controversy nevertheless remains because RailAmerica and AGR misled shippers by imposing a substantial "TIH surcharge without performing any additional services to merit that charge."[10] According to complainants, "the affected shipper," which we assume refers to PPG, is entitled to reparations for this allegedly misleading charge, and the Board should allow complainants to amend their complaint accordingly.[11] Complainants assert that dismissing the proceeding would deny this shipper an opportunity to seek such reparations.[12] In this connection, complainants contend that each of the challenged practices would have occurred under either preexisting service conditions or legal requirements.[13] Hence, complainants assert that AGR and RailAmerica were "misleading the shippers into believing that some additional service [was] being done" in return for the alleged "TIH surcharge."[14]

(. . . continued)
the Board's November 28, 2012 decision, the shipper parties have not presented evidence indicating that respondents are or were carrying out any of the challenged practices outside of their now-withdrawn tariffs.

[9] See CF Feb. 7, 2013 Reply 4-5.

[10] See Complainants Feb. 7, 2013 Reply 5. Although complainants do not cite case law in support of this argument, their claim regarding a misleading charge resembles an argument made by shippers in Docket No. FD 35517, based on Rail Fuel Surcharges, EP 661, slip op. at 7 (STB served Jan. 26, 2007). See, e.g., Dow Chem. Co. Opening 25-26.

[11] See Complainants Feb. 7, 2013 Reply 5.

[12] See id.

[13] See id. at 4.

[14] See id. at 5.

Complainants' surcharge-based allegations will be dismissed. Respondents state that "AGR did not publish a TIH-PIH surcharge,"[15] and our review of respondents' tariffs confirms that they did not impose such a surcharge.[16] Rather, respondents state that AGR "published a new rate for the handling of TIH-PIH,"[17] and the tariff reflects this new, undivided base rate.[18] Given this record, there is an insufficient factual basis for complainants' claim that AGR and RailAmerica misled shippers by imposing a surcharge and performing no services in return, during the time that the challenged practices were in effect.

Absent a showing that respondents misled shippers regarding a rate or charge,[19] it appears that the core issue underlying complainants' claims for reparations in Docket No. NOR 42129—for example, complainants' claims of "a very substantial and totally unjustified" charge[20]—is the degree to which the additional costs respondents incurred in implementing the challenged practices tracked the additional revenues from the increased base rate. Such claims would appear to be foreclosed by the court's ruling in Union Pacific Railroad v. ICC, 867 F.2d 646, 648-49 (D.C. Cir. 1989). In that case, the court of appeals ruled that such claims must be considered in the context of a rate reasonableness complaint case, applying our guidelines applicable to rate complaints, unless it could be explained why our existing rate procedures would be inappropriate.

Thus, because the specific claim for reparations that complainants have made in this unreasonable practice proceeding in Docket No. NOR 42129 does not preserve a live controversy, we will also dismiss the complaint in that docket without prejudice.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

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[15] Respondents Feb. 27, 2013 Reply 8.

[16] See Complainants Oct. 17, 2011 Supplemental Information, Docket No. NOR 42129, Ex. 1, at Item 1013 ("Notwithstanding any other rate provisions for transportation of a TIH-PIH car on AGR, the rate shall be for one car $15,000 per car, for two cars $7,000 per car, and for three cars $5,000 per car.").

[17] Respondents Feb. 27, 2013 Reply 8.

[18] See Complainants Oct. 17, 2011 Supplemental Information, Docket No. NOR 42129, Ex. 1, at Item 1013.

[19] See Rail Fuel Surcharges, slip op. at 7.

[20] See Complainants Feb. 7, 2013 Reply 5.

It is ordered:

1. CF's petition for a declaratory order in Docket No. FD 35517 is dismissed without prejudice.

2. Complainants' complaint in Docket No. NOR 42129 is dismissed without prejudice.

3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.